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No. 00-38

Supreme Court, U.S.
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In The

Supreme Court of the United States

JANET RENO, et al.,

Petitioners,

v.

KIM HO MA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMERICAN ASSOCIATION OF JEWS FROM THE FORMER USSR, CAMBODIAN ASSOCIATION OF AMERICA, CAMBODIAN ASSOCIATION OF GREATER PHILADELPHIA, CITIZENS AND IMMIGRANTS FOR EQUAL JUSTICE, CUBAN AMERICAN ALLIANCE EDUCATION FUND, CUBAN CHRISTIAN DEMOCRATIC HUMAN RIGHTS COMMISSION, HMONG NATIONAL ORGANIZATION, HUMAN RIGHTS IN CUBA, IMMIGRATION TASK FORCE OF MINNESOTA, INTERNATIONAL REFUGEE CENTER OF OREGON, LATIN AMERICAN COMMISSION FOR THE RIGHTS AND FREEDOMS OF THE WORKERS AND PEOPLES, MIDWEST IMMIGRANT & HUMAN RIGHTS CENTER, MOTHERS FOR FREEDOM, MOUNT CARMEL CAMBODIAN CENTER, NATIONAL ASIAN PACIFIC AMERICAN LEGAL CONSORTIUM, SOLIDARITY OF CUBAN WORKERS, SOUTHEAST ASIAN ACTION COALITION, AND UNITED CAMBODIAN COMMUNITY AS *AMICI CURIAE*, SUPPORTING AFFIRMANCE

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INTERESTS OF *AMICI CURIAE*[1]

Amici are community groups whose members are disproportionately affected by the indefinite detention policies of the Immigration and Naturalization Service ("INS"). Our members are the spouses, siblings, parents, children, friends, and neighbors of long-time United States residents who have been detained indefinitely by the INS. We are United States residents and legal permanent residents who share a common sense of hopelessness and frustration caused by the plight of our family and community members in indefinite detention. Like Kim Ho Ma, who was admitted to this country as a refugee at the age of seven, many of our family members have been placed in indefinite detention despite the fact that they have resided legally in this country for much of their lives. Many have spouses, children, parents, and siblings who are United States citizens or permanent residents. Most have deep, long-standing ties to the communities in which they live and in which they grew up. We submit this brief to the Court to demonstrate that people who have resided in the United States legally for years are entitled to due process protections and cannot be treated as if they arrived at the border yesterday.

The **American Association of Jews from the Former USSR** is a grassroots mutual assistance and refugee advocacy organization which unites and represents the interests of Russian-speaking Jewish refugees and legal

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[1] This brief was authored in whole by *amici curiae*. No person or entity, other than *amici curiae*, their members, or their counsel, contributed to the costs of preparation and submission of this brief.

immigrants from the former Soviet Union. Jewish refugees from the former Soviet Union are adversely affected by many aspects of the 1996 immigration laws.

The **Cambodian Association of America** is the oldest Cambodian non-profit organization in the United States and serves the Cambodian community by providing linguistically and culturally appropriate social services that assist Cambodian people in their adaptation to the social, cultural and economic environment of the United States.

The **Cambodian Association of Greater Philadelphia** is a non-profit agency that seeks to improve the quality of life for Cambodian-Americans by providing services, advocating, and empowering Cambodian-Americans within Greater Philadelphia to obtain equal access to social and economic development, quality health care and education. We do so through social, educational and cultural programs, many of which are targeted at Cambodian youth.

Citizens and Immigrants for Equal Justice (CIEJ) is a national coalition of about 700 families in twenty-nine states whose integrity has been or is directly threatened by the 1996 immigration laws. Our members are United States citizens and lawful permanent residents: the family members of lawful permanent residents who face deportation and detention. Painfully, inhumane detention policies have separated many of these loved ones from us indefinitely. On behalf of our loved ones, we have attempted to express our concerns to the INS, worked to spread our message through community groups, and advocated humane statutory change in Congress.

The **Cuban American Alliance Education Fund, Inc.** (CAAEF) is a national nonprofit coalition of Cuban American organizations that works for family reunification and educates the public at large on issues related to hardships caused by current U.S.-Cuba relations. CAAEF is a vehicle for the development of mutually beneficial engagements which promote understanding and human compassion.

The **Cuban Christian Democrat Human Rights Commission, Human Rights in Cuba, The Solidarity of Cuban Workers**, and the **Latin American Commission for the Rights and Freedoms of the Workers and Peoples**, are all non-profit human rights organizations which individually and jointly advocate both nationally and internationally on behalf of Cuban and other refugees and immigrants who are being detained by the INS. We have worked with and on behalf of detainees and their families to request changes to U.S. immigration policies that result in the prolonged, indefinite detention of immigrants.

The **Hmong National Organization** (HNO) is a non-profit organization which seeks to improve the education, growth and development of the Hmong community by providing after school academic programming that emphasizes preservation of the Hmong language and culture while simultaneously providing academic assistance to Hmong youth. HNO also provides many services to the Hmong community, including transportation, interpretation, health education, and citizen instruction.

The **Immigration Task Force of Minnesota** is a coalition of more than seventy religious, social service and community groups working with and for immigrants and refugees to increase awareness of the immigrant experience and the contributions made by immigrants to this country, as well as the effects of policy changes on immigrants and refugees, and to advocate for just, fair, and equitable policies. Minnesota immigrant and refugee communities, especially political refugees from Somalia, Cambodia, and Cuba, are disproportionately affected by indefinite detention.

The **International Refugee Center of Oregon** was established twenty-four years ago to help refugees coming to Portland from all over the world and in particular to help them find their first job in the United States. Our mission is to promote self-sufficiency among refugees and to help refugees preserve their culture.

The **Midwest Immigrant & Human Rights Center** (MIHRC) is a not-for-profit legal services program providing legal assistance and counseling to low-income immigrants regardless of their legal status. MIHRC is a program of the Heartland Alliance for Human Needs & Human Rights, which has provided legal service to and advocacy on behalf of Chicago area residents since 1888. For over 100 years, the Heartland Alliance has met the needs of Chicago's immigrants and refugees through a broad range of social, educational, legal, health, housing and employment programs.

Mothers For Freedom is a group of Cuban-American women whose family members are in INS detention. In 1998 and 1999, our members went on hunger strikes for

more than 40 days at the entrance of the INS Krome Detention Center in Miami to call attention to the plight of our family members and the inadequacy of INS review procedures.

The **Mount Carmel Cambodian Center** serves the Cambodian community in Southern California and nationally through community development programs such as literacy, citizenship, and census awareness projects, long-term student mentoring, and the Cambodian Community Employment Project. Many of the Cambodian immigrants whom our center assists are the family members of indefinite detainees.

The **National Asian Pacific American Legal Consortium** (NAPALC) is a national non-profit, non-partisan organization whose mission is to advance the legal and civil rights of Asian Pacific Americans. Collectively, NAPALC and its affiliates, the Asian-American Legal Defense and Education Fund, the Asian Law Caucus, and the Asian Pacific American Legal Center of Southern California, have over 50 years of experience in legal and public policy advocacy as well as community education on discrimination issues. The Consortium has been engaged in national efforts to reverse the most harmful provisions of the 1996 immigration laws. The question presented by this case is of great interest to NAPALC as it implicates due process protections for Asian Pacific Americans in this country.

The **Southeast Asian Action Coalition** is a grassroots community group of Hmong, Lao, Vietnamese, and Cambodians in Minnesota that seeks to develop and empower

culturally appropriate community leadership to collectively engage in making policy decisions affecting the Southeast Asian community.

United Cambodian Community, founded in 1978, represents about 50,000 Cambodian refugees in Long Beach, California. Our programs aim to help these refugees to adjust themselves smoothly into the American mainstream, and include the Cambodian Community Employment Project, Youth Scope Program, After School Tutoring Program, Cambodian Classical Arts Preservation, and Mental Health Program.

BACKGROUND

Under the INS's interpretation of Section 241(a)(6) of the Immigration and Nationality Act (INA), 8 U.S.C. § 1231(a)(6) (2000), even a long-time legal resident can be subjected to prolonged, and possibly lifelong, detention simply because the United States – through no fault of the individual's – is unable to obtain travel documents to effect removal. *See Pet. Brief* at 14-18. Those affected by this policy include individuals from countries without diplomatic ties with the United States, those from countries that do not have repatriation agreements, those who are stateless due to changing or restrictive citizenship laws, and those from countries without functioning governments. Also affected are those granted relief under the Convention Against Torture, who cannot be legally

removed to their country of origin.[2] Indefinite detention has torn apart many families that have spent years building new lives in this country.

I. Communities affected by indefinite detention

To describe our family members in indefinite detention as "removable aliens" obscures the fact that they came to this country legally – many as refugees who had little choice but to flee their homelands. The communities hardest hit by indefinite detention are those comprised of refugees from Laos, Cambodia, Vietnam, and Cuba. Many served the United States during the Vietnam War, or had parents who served the United States. And still others, the children of unknown American soldiers, came to America seeking refuge in the country of their fathers.

Since 1975, the United States has provided refugee resettlement to nearly one million Vietnamese, Laotians, and Cambodians who initially fled to neighboring countries. In addition, the United States has provided resettlement to another 500,000 Vietnamese who were processed in Vietnam through the Orderly Departure Program in a combination of refugee and immigration programs.[3]

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[2] *See* United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Foreign Affairs Reform and Restructuring Act of 1998 § 2242, Pub. L. No. 105-277, 112 Stat. 2681, 2681-821, codified in 8 C.F.R. § 208.16-18 (2000).

[3] *See* Dep't of State, Dep't of Justice, and Dep't of Health and Human Services, Proposed Refugee Admissions for Fiscal Year 2001: Report to Congress (2000) at 7 (visited Dec. 7, 2000) <http://www.state.gov/www/global/prm/admissions___resettle.html>.

Among these refugees were many Vietnamese who worked for the American government during the long U.S. involvement in Vietnam;[4] members of the Hmong tribal group from Laos who fought alongside, and rescued, American soldiers during the war;[5] and survivors of the Cambodian "killing fields" in which an estimated one to three million people were killed out of a population estimated at 7.3 million.[6]

Refugees from Cuba are also subject to indefinite detention. In the years following the 1959 revolution in Cuba, several hundred thousand Cubans fled the island, including the approximately 260,000 refugees who were officially airlifted from Cuba during the United States-Cuban Freedom Flights program of 1965-1971.[7] In mid-1980, the massive exodus known as the Mariel Boatlift brought a new wave of over 120,000 Cuban refugees to our shores. *See* MARK S. HAMM, THE ABANDONED ONES: THE IMPRISONMENT AND UPRISING OF THE MARIEL BOAT PEOPLE 50 (1995). Although the popular press portrayed many of these so-called "Mariel Cubans" as criminals, in fact only

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[4] *See* PAUL J. STRAND AND WOODROW JONES, INDOCHINESE REFUGEES IN AMERICA 32-33 (1985). *See also* U.S. DEP'T OF STATE, BUREAU OF PUBLIC AFFAIRS, PUB. NO. 8955, BACKGROUND NOTES: VIETNAM (1995).

[5] *See* Jim Sheeler, *Ceremony to Honor 'Secret War' Hmong Helped U.S. Battle N. Vietnamese*, DENVER POST, Jul. 21, 2000, at A1.

[6] U.S. DEP'T OF STATE, BUREAU OF PUBLIC AFFAIRS, PUB. NO. 7747, BACKGROUND NOTES: CAMBODIA (1990).

[7] *See* U.S. Dep't of State, Background information on migration from Cuba (visited 12/7/00) <http://www.state.gov/www/regions/wha/cuba/migration.html>.

350 were found to have serious criminal records, a proportion of criminality considerably lower than that found in the general U.S. population at the time. *See id.* at 59. The vast majority of the Mariel Cubans were paroled into the United States as refugees and many later became permanent residents. *See id.* at 58.

Also affected by indefinite detention are individuals whose citizenship is not recognized by any country. For example, the Romani, commonly referred to as gypsies, are considered to be stateless by many countries. *See, e.g., Moro v. INS*, 58 F. Supp. 2d 854, 855 (E.D. Ill. 1999) (refusal of Yugoslavia to recognize citizenship of Romani). Those born in refugee camps are often considered stateless as well. *See, e.g., Zadvydas v. Underdown*, 185 F.3d 279, 283-4 (5th Cir.), *cert. granted*, 121 S. Ct. 297 (2000) (individual born in refugee camp in Germany not recognized as citizen by either Germany or Lithuania). Another form of statelessness arises from shifts in national boundaries or rule. The breakup of the former Soviet Union, for example, led to the formation of a number of independent states; these new nations have in many instances refused to recognize as citizens those who were not physically present at the time independence was declared. *See, e.g., Batyuchenko v. Reno*, 56 F. Supp. 2d 1163, 1163 (W.D. Wash. 1999) (refusal of Belarus to recognize citizenship of refugee from former Soviet Union). Soviet Jews, who experienced persecution throughout the Soviet republics and continue to flee from those areas to this day, comprised one of the two most numerous groups of refugees to

come to the United States from the 1970s through 1990.[8] Many of these refugees came from areas such as Ukraine that are now independent states.[9] As recent events in the Balkans and elsewhere make clear, statelessness threatens to be an enduring issue in this era of shifting borders.

II. Illustrative cases of families that have been affected by indefinite detention

As refugees and immigrants, we have built new lives in this country. We work for or run local businesses. Our children attend local schools and play on local athletic teams; they grow up and get married here, and begin families of their own.[10]

As we have learned, however, our communities are not immune from the problems that affect all American communities. Some of us, particularly our young people,

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[8] STEVEN J. GOLD, REFUGEE COMMUNITIES: A COMPARATIVE FIELD STUDY 3 (1992) (identifying Soviet Jews and Vietnamese as the most numerous refugee groups during this period).

[9] *See, e.g.*, Gary Rotstein, *From Russia with Hope: Kiev Family Flees Anti-Semitism to Grapple with a New Language and a New Land*, PITTSBURGH POST-GAZETTE, February 21, 1995, at C1; Nicole Carroll, *Living in the U.S.A.: Soviet Jews Find New Home, Study Twang on Texas Border*, HOUSTON CHRONICLE, December 8, 1991, at 12.

[10] For discussions of some of the refugees referred to in this brief, *see, e.g.*, John K. Whitmore et al., *The Socio-Cultural Basis for the Economic and Educational Success of Southeast Asian Refugees (1978-1982 Arrivals), in* REFUGEES AS IMMIGRANTS 121 (David W. Hines ed. 1989); NATHAN CAPLAN ET AL., CHILDREN OF THE BOAT PEOPLE: A STUDY OF EDUCATIONAL SUCCESS (1994); JAMES S. OLSON AND JUDITH E. OLSON, CUBAN AMERICANS: FROM TRAUMA TO TRIUMPH 94 (1995); GOLD, *supra* note 8.

go astray at some point in our lives. In addition to the issues that face all communities, ours face the added factor that many of us endured trauma and violence in fleeing our homelands, as well as the stresses of social dislocation and generational conflict that have arisen during our integration into American society. *See, e.g.*, LILIAN FADERMAN WITH GHIA XIONG, I BEGIN MY LIFE ALL OVER AGAIN: THE HMONG AND THE AMERICAN IMMIGRANT EXPERIENCE (1998). For example, many Cambodian refugees saw members of their families tortured, mutilated or killed. *See* JAMES A. TOLLEFSON, ALIEN WINDS, THE REEDUCATION OF AMERICA'S INDOCHINESE REFUGEES 29 (1986). They arrived at refugee camps on the brink of starvation. *See id.* at 4. Refugees who survived these horrifying conditions have post-traumatic stress symptoms that have been compared to those experienced by Holocaust survivors.[11]

For our young people, relatively minor brushes with the law can have lifelong consequences. Under the broad sweep of the Antiterrorism and Effective Death Penalty Act[12] and the Illegal Immigration Reform and Immigrant Responsibility Act[13] passed in 1996, even a conviction for petit larceny can result in mandatory removal regardless

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[11] *See* Cambodian Health Network, The Roots of the Cambodian Health Crisis (Working Paper) at 1 (viewed 12/12/00) <http://www.cambodianhealth.org>.

[12] Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified in scattered sections of 8, 18, 22, 28, 40, and 42 U.S.C.).

[13] Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546 (1996) (codified in scattered sections of 8 and 18 U.S.C.).

of the equities of the individual case.[14] Under the INS's current policy of indefinite detention, those orders of removal can mean incarceration for years on end, far from family and loved ones. Even individuals who served no time in jail can be subjected to indefinite detention. *See Vo v. Greene*, 63 F. Supp. 2d 1278, 1279 (D. Colo. 1999); Bruce Finley, *Trapped Between Two Countries: Laotian Among Immigrant Criminals in Limbo*, DENVER POST, Feb. 29, 2000 at A1.

When someone is placed in indefinite detention, it affects not just the individual but the entire family. The following are just a few examples of the ways in which families that have rebuilt their lives in the United States have been torn apart by indefinite detention.

A. The Kay Family

After losing her husband and her daughter to the conflict in Cambodia, Chorn Porn fled the Cambodian

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[14] Under the current Immigration and Nationality Act, individuals convicted of crimes that are labeled as "aggravated felonies" are barred from relief from removal. *See* INA § 240A(a)(3), 8 U.S.C. § 1229b(a)(3) (2000). Courts of Appeals have held that misdemeanor convictions can meet the definition of "aggravated felony." *See United States v. Pacheco*, 225 F.3d 148, 153 (2d Cir. 2000) (holding that misdemeanor conviction for shoplifting for which a suspended sentence of one year was given constitutes "aggravated felony" within the meaning of the INA); *United States v. Graham*, 169 F. 3d 787, 791-92 (3d Cir.), *cert. denied*, 528 U.S. 845 (1999) (holding that a conviction for petit larceny that carries a maximum sentence of one year constitutes an "aggravated felony" within the meaning of the INA).

killing fields on foot with her three surviving children, Sombat Map Kay, Mouv Kay, and Nochanntha Kay. They arrived at the Koie Dang border refugee camp in Thailand and spent several years in refugee camps. In 1985, a few days after Sombat's eleventh birthday, they were admitted to the United States. The family was resettled in Manchester, New Hampshire, where they were sponsored by the International Institute of New Hampshire. Saroeun Khan, an uncle, also resettled in Manchester, and took on a father-figure role with the children.

Sombat attended elementary and high school in Manchester, where he was known as a reliable friend and a good basketball player. He became involved with a bad crowd, however, and in 1992, at the age of seventeen, he was convicted of armed assault and sentenced to ten years with the possibility of parole in three. During his incarceration, Sombat completed an intensive, six-month Anger Management and Behavioral Modification program as well as a GED course. He also received employment training and held a position as a grounds keeper on the janitorial staff. He was active in group programs such as basketball, football, and baseball.

In 1996, while still in prison, Sombat was ordered removed to Cambodia. Upon his release from prison in December, 1997, he was taken into INS custody. Cambodia does not have a repatriation agreement with the United States and thus would not issue Sombat the necessary travel documents. In spite of Sombat's strong family ties in Manchester and his proven record of rehabilitation, he was kept in detention. He was released only after a federal court granted his petition for a writ of habeas

corpus in April, 2000, after he had spent nearly two-and-a-half years in detention.[15]

B. The Yngelmo Family

Maria and Pedro Yngelmo fled Cuba in 1981, bringing with them their four-year-old son, Pedro Jr., and his younger sister, Ana. They settled in Elizabeth, New Jersey. Maria has been employed as an accounting clerk at the Elizabethtown Water Company for the past thirteen years. Pedro Sr. is a hi-low driver at a Pathmark warehouse in Elizabeth. The Yngelmos have lived in the same apartment in Elizabeth for over a decade. Ana recently graduated from the Wharton School of Business at the University of Pennsylvania and is an economic consultant with Deloitte and Touche in New York City. Maria, Pedro Sr., and Ana are all naturalized U.S. citizens.

Pedro Jr. was an honors student in the Gifted and Talented Program of the City of Elizabeth Public Schools and a star Little League baseball player. He became involved with drugs, however, and in 1995, at the age of 19, he was convicted on drug and handgun possession charges and sentenced to four years in prison. While in prison he was ordered removed, and upon completion of his sentence he was released into INS custody and placed in detention. Cuba does not have diplomatic ties with the United States and thus does not issue travel documents to those whom the United States wishes to remove. Pedro

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[15] *See Kay v. Reno*, 94 F. Supp. 2d 546, 547-48 (M.D. Pa. 2000); Pet. for Writ of Habeas Corpus, *Kay v. Reno*, 1:CV 99-251 (M.D. Pa. 1999), Exh. B (Petitioner's Request for Order of Supervision and Supporting Documentation, dated July 13, 1999) at 1-7.

remained in detention for nearly eighteen months. He was not released from detention until November, 2000, following his filing of a habeas corpus petition in district court.[16]

C. The Batyuchenko Family

Dennis Batyuchenko and his parents immigrated to the United States as religious refugees from the Soviet Union in 1991 and settled in Bellevue, Washington, a suburb of Seattle. Like other Soviet refugees, they were forced to renounce all rights to Soviet citizenship in order to leave. At the time that the family came to America, Dennis was sixteen years old.

From May, 1993 until September, 1995, Dennis worked as a volunteer weightlifting instructor at the Crossroads Community Center in Bellevue. In recognition of his significant contribution to the Community Center, he was selected as the City of Bellevue's "Volunteer of the Quarter." In 1995, however, Dennis was convicted of theft and sentenced to five days in jail (with three days suspended) and twelve months probation. In 1996, he was convicted of receiving stolen property; he received a sentence of one year in jail and was released after serving

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[16] *See* Pet. for Writ of Habeas Corpus, *Yngelmo v. Reno*, 00-1035 (D. N.J. 2000) at ¶¶ 12-34 & Exh. A (Petitioner's request for Order of Supervision and Supporting Documentation dated Nov. 19, 1999) at 1-5; Petitioner's Memorandum of Law in Support of Petition for Writ of Habeas Corpus and Order to Show Cause at 1-6; Steve Chambers, *Cuban Man Escapes Legal Limbo – Family Efforts Help Win Release for INS Detainee*, STAR-LEDGER (Newark), Nov. 27, 2000; Steve Chambers, *Inmates Languish in Legal Limbo – Cuban Now A "Lifer" Under INS Authority*, STAR-LEDGER (Newark), Jun. 18, 2000.

123 days. On the basis of the 1995 and 1996 convictions, Dennis was taken into INS custody in December, 1996 and ordered deported to Belarus (which had become an independent nation in the time since Dennis's family emigrated) in January, 1997. Both Belarus and Russia refused to recognize Dennis as a citizen, and he was held in indefinite detention by the INS. Dennis was not released from INS custody until his petition for habeas corpus was granted in September, 1999, two-and-a-half years after he entered INS custody.[17]

D. The Fernandes Family

In 1971, at the age of ten, Jose Fernandes came to the United States from Angola with his family. The Fernandes family settled in Rhode Island as legal immigrants. Jose grew up in Rhode Island and attended local schools. Besides his immediate family, Jose also has aunts, uncles and cousins living nearby. In the early 1990s, he regularly attended weekly Bible Study sessions at the Fourth Baptist Church in Providence. He became addicted to drugs, however, and in 1995 he was convicted on charges of

[17] *See Batyuchenko v. Reno*, 56 F. Supp. 2d 1163, 1163 (W.D. Wash. 1999); Pet. for Writ of Habeas Corpus, *Batyuchenko v. Reno*, C 99-185 R (W.D. Wash. 1999) Exh. A (Aff. of Jay W. Stansell, Esq., dated Aug. 27, 1999) at ¶¶ 5-20 & Exh. G at 1-3 (Letter of James McClain, Recreation Coordinator, Crossroads Community Center; letter to Mr. Batyuchenko from James McClain dated Aug. 27, 1994); Order Granting Writ of Habeas Corpus, Sept. 10, 1999; *Varied Route Led Immigrants to INS Custody*, Seattle Post-Intelligencer, June 17, 1999, at B1; Lise Olsen, *Case Tests the Rights of Immigrants Held in US Jails*, Christian Science Monitor, May 25, 1999, at 2.

drug sale and possession and sentenced to ten years, of which all but two years were suspended.

While in prison, Jose completed numerous training programs, including Infectious Disease Peer Education, HIV-STD Prevention, Law Library Research, High School Equivalency, Computer Literacy, and a workshop on Alternatives to Violence. He was an active participant in the Relapse Prevention/Drug Education Group and the Cognitive Restructuring/Trigger Identification Group. In August, 1996, while still in prison, Jose was ordered removed to Angola or, in the alternative, to Portugal.

Jose was released from prison in September, 1996, taken into INS custody, and placed in detention. Angola, which had been a Portuguese colony at the time of the Fernandes family's departure and had subsequently gained independence, refused to issue him travel documents. So did Portugal and Cape Verde. As he stated in his *pro se* petition for habeas corpus, "Myself, being raised in America, it would be devastating for me to be deported back to Angola. 99% of my family is here in America." Nevertheless, faced with the prospect of a life sentence in INS detention, Jose wrote repeatedly to Angola pleading with the government to issue him the necessary documents, to no avail. He was not released from detention until his petition for habeas corpus was granted in May, 1999, nearly three years after he had been taken into INS custody.[18]

[18] *See Fernandes v. INS*, 79 F. Supp. 2d 44 (D. R.I. 1999); Pet. for Writ of Habeas Corpus, *Fernandes v. INS*, 97-CV-630 (D. R.I. 1997), at ¶¶ 11-12 & Exhibits; Karen Lee Ziner, *Immigration Officials Ordered to Release Legal Alien From Prison*, Providence Journal, May 1, 2000, at A4.

These examples go on and on. Thousands of American families have lost children, parents, siblings, and other loved ones to the INS's indefinite detention policies.

ARGUMENT

DUE PROCESS APPLIES TO OUR FAMILY MEMBERS DUE TO THEIR LONG-STANDING TIES TO THE UNITED STATES

As longtime legal residents of the United States, our family members are entitled to due process protection. *See Wong Wing v. United States*, 163 U.S. 228, 238 (1896) ("[I]t must be concluded that all persons within the territory of the United States are entitled to the protection guaranteed by [the Fifth and Sixth] amendments. . . . "). The Due Process Clause of the Fifth Amendment protects us in its simple guarantee that "no person . . . shall be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V. Our family members, who have been present in the United States for years, should not be treated as if they had never entered the United States at all.

The Court has made a clear differentiation between the government's plenary power over the "right of the alien to land," *Yatamaya v. Fisher*, 189 U.S. 86, 98 (1903), and the government's lesser powers with respect to resident aliens. *See Leng May Ma v. Barber*, 357 U.S. 185, 187 (1958) ("[O]ur immigration laws have long made a distinction between those aliens who have come to our shores seeking admission . . . and those who are within

the United States after an entry, irrespective of its legality."). In *Landon v. Plasencia*, 459 U.S. 21, 32 (1982), the Court held that "[o]nce an alien gains admission to our country and begins to develop the ties that go with permanent residence, his constitutional status changes accordingly."

Refugees by definition have forsaken their ties to the countries they fled. Describing Southeast Asian refugees, sociologist Steven J. Gold explains, "[Most] boat people realized the futility of retaining attachments to a way of life they knew no longer existed. Further, because their experience of migration was so painful, many wished to distance themselves from past." *See* STEVEN J. GOLD, REFUGEE COMMUNITIES: A COMPARATIVE FIELD STUDY 117 (1992). Many members of our communities did lose everything, and did rebuild their lives in the United States. The ties cited by the Court in *Plasencia* are thus particularly meaningful to our communities, which lost so much and have worked so hard to build anew.

Although our family and community members have final orders of removal, this does not change the fact that, like the petitioner in *Plasencia*, they gained admission to this country – in some cases, decades ago – and developed the family and community ties that go with permanent residence. Pedro Yngelmo has lived in New Jersey since the age of four. His entire education has been in New Jersey public schools. Everyone else in his immediate family is a naturalized U.S. citizen. Sombat Map Kay has lived in New Hampshire since he was eleven years old. With the exception of one elderly aunt whose whereabouts are unknown, every surviving member of his

entire extended family is in New Hampshire. Jose Fernandes has lived in Rhode Island for twenty-nine of his thirty-nine years. Virtually all of his family resides in the United States. With the issuance of a final order of removal, our family members' technical immigration status has changed, but the circumstances of their lives have not. They are still individuals who have lived in the United States for years, and many have spent the better part of their lives here.

The weight accorded to family ties in *Plasencia*, 459 U.S. at 34, is part of a broader constitutional framework recognizing family unity as a significant private interest worthy of constitutional protection. *See Moore v. East Cleveland*, 431 U.S. 494, 503-4 (1977) ("[T]he Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural."). Those in indefinite detention are there because the government has failed to locate a country to which they can be removed. For these individuals, therefore, the United States is not only *a* locus of family ties, it is in fact the *only* locus of such ties. Even if the families of detainees were willing and able to make the extreme sacrifice of giving up all they have built in the United States (either as immigrants or as native born United States citizens) and relocating to another country to be with their loved one, no such option exists.

The separation wrought by indefinite detention places a great strain not only on detainees but on their families, who are deprived of the emotional and, often,

financial support of a parent, child or spouse. For refugees in particular, many of whom have already lost family members to the violence and persecution from which they fled, losing a family member to indefinite detention is an extreme hardship. Chorn Porn, for example, endured the loss of her husband and daughter, and much of her extended family, in the killing fields of Cambodia; she then had to endure the loss of her son Sombat to indefinite detention. Assuring the application of constitutional scrutiny based on the reality of family and other ties protects these U.S. citizen and permanent resident family members of those the INS is detaining indefinitely.

CONCLUSION

In the words of indefinite detainee Arounkon "Tay" Saynarouth, a 24-year-old refugee from Laos who has resided legally in the United States since the age of six, "Everything we learned was from American society. But the INS considers us the problem of America. We're not perfect. But the INS can't keep us [in detention] forever because of that." *See* Tony Perez-Guise, *Waiting to Exile*, WESTWORD, Jan. 21, 1999, at 14. Like Mr. Saynarouth, many of our family and community members in detention have also lived here since they were small children. All of the people and places to which they are tied are here in the United States. To treat them as individuals newly arrived at the border is to turn a blind eye to the most basic circumstances of their lives.

For the foregoing reasons, the decision of the Court of Appeals should be affirmed.

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